

Information Services Board Briefing Paper on Proposed Updated Information Technology Model Contracts

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Description

The Department of Information Services (DIS) will present summaries of four proposed updated model information technology (IT) contracts, including recommended required terms, which if adopted will replace the three current model contracts and required terms adopted by the Information Services Board (ISB) in 1996. These proposed models were drafted by staff from the four service divisions of DIS, all of whom have expertise and specialized experience in IT contracting. The proposed model contracts have been reviewed by the Office of Financial Management (OFM), the Washington Association of Contracts Specialists, the contracts work group of the Office of the Attorney General, and the State Auditor's Office.

Background

In 1996, the ISB adopted three model IT contracts for equipment, software, and purchased services. These models included required terms and conditions. Required terms are those whose substantive concept must be included in an IT contract, although the exact language used in the model terms need not be used. The model contracts became appendices to the former ISB Acquisition and Disposal of Information Technology Resources Policy. Agencies were required to use these model contracts for IT acquisitions that were undertaken subsequent to the model contracts' adoption but were not required to use the model contracts for acquisitions that had begun, or for contracts that were already in negotiation prior to the ISB adoption of the model contracts.

Since 1996, there have been legal and policy changes that affect IT contracts. For example, Executive Order 00-03, Public Records Privacy Protections, and the ISB policy on privacy provide requirements that need to be included in all contracts where personally identifiable information is shared with a vendor. There have also been changes in the law and new court decisions regarding software licensing. Changes in technology also affect the terms needed in IT contracts. For example, it is now common to have embedded software in equipment, which in turn means that equipment contracts should address software licensing issues. Finally, the potential adoption of the Uniform Computer Information Transactions Act (UCITA) has implications for all software contracts and the need for additional language to best protect the interests of the state.

Status

There are four proposed model IT contracts for agencies to use when acquiring IT equipment, software, purchased services, or personal services. The 1996 model contracts covered only IT equipment, software, and purchased services. For personal services, agencies may currently use the OFM model personal services contract. There is a proposed fourth model contract specifically tailored for IT personal services that addresses legal issues presented by IT personal services.

The proposed model contracts contain significant changes, some of which are described here. First, the software ownership section broadens protection against copyright or patent infringement to worldwide rights and includes third-party trade secrets, contracts, and confidentiality rights. Second, the Year 2000 Warranty is changed to a broader date warranty.

Next, the "No Surreptitious Code Warranty" is strengthened as protection against future enactment of UCITA, to prevent vendors from including surreptitious code or self-help code in licensed software. The revised model contracts take advantage of options available under UCITA to protect and promote the states interests.

The proposed model contracts also recommend additional required sections. These proposed additional required sections include Survivorship; License Grant; Software Ownership; Vendor Commitments, Warranties and Representations; Ownership/Rights in Data; Protection of Purchaser's Confidential Information; No Surreptitious Code Warranty; Section Headings, Incorporated Documents and Order of Precedence; Independent Status of Vendor; and Vendor's Proprietary Information.

Agencies that are acquiring a combination of equipment, software, and services are instructed to start with the model contract that addresses the major purpose of the acquisition and then integrate additional sections from other relevant models.

The proposed model contracts, if adopted by the ISB, will be posted in Microsoft Word on the portfolio web site. The proposed model contracts include color-coded instructions and fill-in-the-blanks so that agencies can use them without needing to consult a separate instructions document. The new models also include hyperlinks and take advantage of MS Word functions that automatically change certain fields and references.

Issues

The current model IT contracts are outdated or incomplete. At the request of the Board, the model contracts have been reviewed by the Office of the State Auditor since they were first presented to the ISB in September 2002.

Recommendation

DIS recommends that the ISB adopt the four proposed model IT contracts, including the recommended required terms, to replace the current model contracts and required terms. DIS also recommends that agencies be required to use the proposed model contracts and required terms for acquisitions that begin after the date of ISB adoption but not be required to use the model contracts and required terms for acquisitions that were underway or for contracts that were already in negotiation on the date of ISB adoption.